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CPLR 311: Court validates improper service where corporation had deceived process server.

Under CPLR 311, only an authorized agent may accept process on behalf of a corporation. Such persons include an officer, director, managing or general agent, and a cashier or assistant cashier. Perhaps because of the difficulty confronting the process server in discerning whether a particular person is in fact an agent qualified to receive process, two exceptions to the general rule of strict compliance with the statute have arisen. The first can be described as the "acting" authorized agent rule. This approach recognizes the inequity of allowing a corporation to successfully contend that under certain circumstances there may be no one present who is authorized to receive process.²⁶ The second exception can be styled the "prompt redelivery" rule. Here, service upon the wrong person may be valid if redelivery to an authorized agent "is so close in time and space that it can be classified as part of the same act."²⁷ A condition precedent to valid service under this exception, however, is that the process server "has acted reasonably and diligently in attempting to fulfill the statutory mandate."²⁸ Seizing upon the process server's due diligence as evidencing the bona fides of his conduct, the court in *Belofatto v. Marsen Realty Corp.*²⁹ recently added a third exception to case law in the area.

In *Belofatto* the process server went to the defendant corporation's place of business where he stated his purpose to the receptionist. She escorted him to an inner office and introduced one Frank Gilbert as a person authorized to receive service for the corporation. Gilbert confirmed his authority and accepted the process. The defendant corporation subsequently moved to dismiss the complaint, asserting that Gilbert was not even in their employ, much less an agent authorized to receive process. Nonetheless, service was upheld, apparently because,

²⁶ See *Buckner v. D&E Motors, Inc.*, 53 Misc. 2d 382, 278 N.Y.S.2d 932 (Sup. Ct. Erie County 1967); *Collini v. Turner Constr. Co.*, 129 N.Y.S.2d 485 (Sup. Ct. Kings County 1959). But see *Isaf v. Pennsylvania R.R.*, 32 App. Div. 2d 578, 299 N.Y.S.2d 231 (3d Dep't 1969). For a cogent criticism of *Isaf*, see *The Quarterly Survey*, 44 ST. JOHN'S L. REV. 313, 325-29 (1969).

²⁷ *Green v. Morningside Heights Housing Corp.*, 13 Misc. 2d 124, 125, 177 N.Y.S.2d 760, 761 (Sup. Ct. N.Y. County), *aff'd*, 7 App. Div. 2d 708, 180 N.Y.S.2d 104 (1st Dept 1958). But see *McDonald v. Ames Supply Co.*, 22 N.Y.2d 111, 238 N.E.2d 726, 291 N.Y.S.2d 328 (1968). For a forceful criticism of *McDonald*, see 7B MCKINNEY'S CPLR 308, *supp. commentary* at 185-86 (1969).

²⁸ *McDonald v. Ames Supply Co.*, 22 N.Y.2d 111, 115-16, 238 N.E.2d 726, 728, 291 N.Y.S.2d 328, 331-32 (1968). Cf. *Buscher v. Ehrich*, 12 App. Div. 2d 887, 209 N.Y.S.2d 941 (4th Dep't 1951) (service upheld where defendant resisted service and process server left summons in defendant's general vicinity).

²⁹ 62 Misc. 2d 922, 310 N.Y.S.2d 191 (N.Y.C. Civ. Ct. N.Y. County 1970).

in addition to the process server's due diligence, the court was satisfied that the defendants were a party to the deception. Special cognizance was taken of the receptionist's role: "[A process server] has the right to assume that corporate employees whose duties include meeting and guiding visitors will act honestly and cooperatively."³⁰

It is difficult to disagree with a decision that places ultimate responsibility on a corporation for the misconduct of its employees. It should be noted, however, that a decision such as *Belofatto* must achieve a delicate balance between countervailing equities. On one hand, there is the danger that sustaining improper service will lead to carelessness and increase the risk of default by the purported recipient.³¹ On the other hand, exacting compliance with CPLR 311 might invite corporate defendants "to engage in deceptive maneuvers designed to mislead the process server and to defeat justice."³² Hence, of necessity, general rules cannot be propounded; exceptions must be carefully carved out in special situations.³³ Nonetheless, it is hoped that in the future more decisions will be tempered by the sense of fairness pervading the *Belofatto* outcome.

CPLR 320(b): Conduct inconsistent with a desire to raise jurisdictional objection deemed an appearance.

If process or its service is insufficient to provide the court with personal jurisdiction, such jurisdiction will nonetheless be secured if the defendant makes an appearance.³⁴ Under CPLR 320(a), defendant appears "by serving an answer, or a notice of appearance, or by making a motion which has the effect of extending the time to answer." In *Rizika v. Board of Assessors*,³⁵ it was conceded that service of a petition to review a tax assessment by mail, instead of by personal delivery as required by statute,³⁶ was improper.³⁷ And, the recipient had not taken any action which would constitute an appearance under CPLR 320(a).³⁸

³⁰ *Id.* at 924, 310 N.Y.S.2d at 193.

³¹ *McDonald v. Ames Supply Co.*, 22 N.Y.2d 111, 116, 238 N.E.2d 726, 728, 291 N.Y.S.2d 328, 332 (1968).

³² *Belofatto v. Marsen Realty Corp.*, 62 Misc. 2d 922, 924, 310 N.Y.S.2d 191, 193 (N.Y.C. Civ. Ct. N.Y. County 1970).

³³ One important factor in *Belofatto* was that the statute of limitations was about to expire when service was effected, and the court was of the opinion that a dismissal of the complaint would deprive plaintiff of his day in court. *Id. Accord*, 7B MCKINNEY'S CPLR 205, supp. commentary at 49 (1964).

³⁴ CPLR 320(b): "... unless an objection to jurisdiction under paragraph eight of subdivision (a) of rule 3211 is asserted by motion or in an answer as provided in rule 3211."

³⁵ 62 Misc. 2d 774, 310 N.Y.S.2d 43 (Sup. Ct. Herkimer County 1970).

³⁶ REAL PROP. TAX LAW § 708 (McKinney 1960).

³⁷ See *Pennington v. Board of Assessors*, 34 Misc. 2d 336, 227 N.Y.S.2d 964 (Sup. Ct. Jefferson County 1962).

³⁸ Usually, a defendant must make an appearance in order to avoid a default judgment.